IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 6TH NOVEMBER 2007 / 15TH KARTHIKA 1929

Crl.MC.No. 5404 of 2003(A)

CC.1/2003 of JUDL.MAGISTRATE OF FIRST CLASS COURT-I, KANNUR

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PETITIONER/ACCUSED NO.9:

B.R.SHETTY, NEW MEDICAL CENTRE
ABU DHABI, U.A.E.

BY ADV. SRI.M.K.DAMODARAN (SR.)
SRI.M.T.SURESHKUMAR

RESPONDENTS: COMPLAINANT AND STATE

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1. N.MUKUNDAN, RATHI NIVAS,
OPP.POST OFFICE, PALLIKUNNU, KANNUR-4.

2. STATE KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY ADV. SRI.SARVOTHAMAN
R2 BY PUBLIC PROSECUTOR MR. AMJAD ALI

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 14-8-2007 ALONG WITH CRMC NO. 5405 OF 2003 CRMC NO. 2282 OF 2004 CRMC NO. 20 OF 2004 CRMC NO. 21 OF 2004 CRMC NO. 917 OF 2004 CRMC NO. 921 OF 2004 THE COURT ON 6-11-2007 PASSED THE FOLLOWING:

K.R. UDAYABHANU, J.

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CRL.M.C.NOS. 5404, 5405 OF 2003 &

CRL.M.C.NOS.20, 21, 917, 921 & 2282 OF 2004

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DATED THIS THE 6TH DAY OF NOVEMBER 2007

ORDER

The petitioner in Crl.M.C.No.5404/2003 is 9th accused in C.C.No.1/203, the petitioner in Crl.M.C.No.5405/2003 is the 9th accused in C.C.No.80/2003, the petitioners in Crl.M.C.No.20/2004 are accused 1,3,4,6,7,8 & 11 in C.C.No.80/2003, the petitioners in Crl.M.C.No.21/04 are accused 1,3,4,6,7,8 & 11 in C.C.No.1/03, the petitioner in Crl.M.C.No.917/2004 is accused No.9 in C.C.No.240/2003, the petitioner in Crl.M.C.No.921/04 is the 9th accused in C.C.No.537/03 and the petitioners in Crl.M.C.No.2282/04 are accused 1 and 3 in C.C.No.57/2003 in the file of the Judicial First Class Magistrate Court-I, Kannur with respect to the offence under Sections 406, 409 and 420 read with Section 34 of the Indian Penal Code.

2. The 9th accused in C.C.No.1/03, 80/03, 240/03, 537/03 has sought for getting quashed the above proceedings which have been instituted alleging that the petitioner and other accused are the Directors etc. of Vijaya Leasing Commercial Credit Ltd. committed cheating criminal breach of trust and misappropriation etc. as the amounts deposited amounting to Rs.2,18,000/-; Rs.1,00,000/-; Rs.1,00,000/-;Rs.1,50,000/- in fixed deposit in the year 1998 did not repay the amounts when approached after the date of maturity of the above deposits. It is also alleged in the private complaint filed which was taken cognizance by the court below that accused Nos.2 to 10 including the petitioner are the Directors of the first accused company and accused No.11 is the Manager of Kannur Branch in which the amounts were deposited. The registered office of the company at Mangalore and Administrative Office at Bangalore and branches in different parts of the country. It is alleged that the first accused company is managed by the Vice Chairman and the Managing Director, i.e.3rd accused under the over all supervision and control of the Board of Directors. It is also alleged that the

affairs of the first accused company are managed by all the accused and hence all are directly responsible for conduct of the business affairs of the company. It is alleged that the accused describing themselves as financiers published and advertised that they are doing business in the nature of banking. It is also alleged that it was also represented that accused No.1 of a Subsidiary of Vijaya Bank and many advertisements were published offering advantageous terms and benefits which were not or could not have been granted by nationalised or scheduled banks. After the date of maturity of the deposits, the complainants approached Kannur branch and asked accused No.11, the Manager to return the money after submitting original receipts. The complainants were intimated by accused No.11 that the company does not have funds to make the payment. It is alleged that the accused have committed large scale fraud and that the complainants had deposited the entire life time earnings with them. It is also alleged that 4 crores of rupees have been collected from Kannur itself by the misrepresentation and fraud and Action Council was formed by he depositors who were

cheated. Registered notice was sent to all the accused. The 3rd accused has sent a reply admitting liability and requesting for time but no amounts were paid so far. The matter was protracted and prolonged in the guise of settlement. The accused with the common intention after hatching criminal conspiracy dishonestly closed down the branches at Kannur. The complaint was filed before the court which was forwarded to the S.H.O.Kannur town police station but the police due to the influence of the accused filed a refer report stating that it is a dispute of civil nature. It is alleged that accused are guilty of the offences under Sections 406, 409 & 420 read with Section 34 of the Indian Penal Code. Hence the protest complaint filed.

3. It is contended by the petitioner, i.e.9th accused that the allegation that all the Directors are directly responsible for the conduct of the business affairs of the company is a vague and general statement and that the petitioner/A9 is with the non-resident Indian presently residing at Abu Dhabi and that he is the Managing Director of U.A.E. Exchange. It is pointed out that the complaint with the identical allegations was filed before the

court and the same forwarded under Section 156(3) Cr.P.C. After investigation it was closed with refer report filed by the police. It is pointed out that even according to the complainant, A3, the Vice Chairman and the Managing Director of 1st accused company is the person in charge and responsible to the conduct of the said company. There is only a vague allegation that all the Directors are responsible to conduct of the business of the company. It is pointed out that the complainant has mentioned that A11, the Manager has acknowledged the liability and offered to make payment in accordance with the schedule. The receipt of deposit etc. are exclusively transacted by the Manager and the Managing Director of the Company and hence it is only 3rd and 11th accused who are involved in the transaction and that the rest of the Directors have not an active role in the commission of the offence. Vicarious liability cannot be foisted on the petitioner. The complaint revealed that it is purely a civil dispute. There is no allegation that there was fraudulent and dishonest intention at the very inception of the transaction. There is not even a remote possibility of the case against the

petitioner ending in a conviction.

4. The rest of the accused who have filed application to quash the complaints have contended that petitioners 5 and 6, i.e. A7 and A8 had resigned and retired on 18-12-1998 from the Directorship of the first accused company. Annexure-A2 is said to be Form No.32 in this regard. It is further pointed out that accused No.1 is a public limited company registered under the Companies Act. It is a non-banking finance company registered with the Reserve Bank of India till 1999. The company was accepting deposits from the public as provided under Section 58 A of the Companies Act. The advertisements were issued under the strict guidelines issued by the Reserve Bank of India. Further the company has become sick in 1999 and had to stop non-banking financial activities. The Reserve Bank of India had directed the company not to accept the deposits in the year 1998. It is submitted that the Company Law Board invoking Section 45 Q(a) rephased repayment of the deposit in instalment of four months to 39 months depending upon the size of the deposits as per its order dated 14-4-2000. The direction of the

Company Law Board could not be honoured properly as recovery from the borrowers were meagre. Further the Reserve Bank of India had filed a company petition for winding up in July 2002 and the High Court of Karnataka admitted the application in January 2003. As per the interim order passed in COP 126/2002, the High Court of Karnataka was pleased to restrain the company from making any payments in pursuance of any court decree or on warrant for arrest or in answer to any coercive steps taken against the company for the payment of the amount. Copy of the order is produced as Annexure-A3. It is also alleged that offence against the first accused will not lie as the first accused is a corporate person. It is alleged that there is no allegation against the Directors in their personal capacity. It is further pointed out that as per Section 58-A of the Companies Act the violation of the mode prescribed therein would entail in punishment. Section 58 B of the Reserve Bank of India Act provides for penalty for breach of any of the directions in this regard. Hence, taking cognizance is abuse of process of the court as statutory functionaries have already taken cognizance

of the matter. The offender shall not be liable to be prosecuted for the same offence under different Acts.

5. At the outset, it has to be noted that the allegation made by the complainant that accused made advertisements to the effect that the first accused is a subsidiary of Vijaya Bank, a Nationalised Bank has not been specifically denied.

6. It is the contention of the petitioners that there are provisions in the Companies Act for penalising for the alleged defalcation, if any, committed and also that while the matter is pending with respect to winding up, the present proceedings cannot be sustained. Counsel for the respondent/ complainant has relied on the decision in **Pankaj Mehra** v. **State of Maharashtra 2000(2)K.L.T. 338(SC)**in support. The court held that there is no provision in the Companies Act which prohibits enforcement of a debt due from the company. The above matter related to the filing of a complaint under Section 138 of the Negotiable Instruments Act, when a petition for winding up of the company has been presented and pending and a provisional liquidator appointed. It was held that if the

above contention is upheld unscrupulous parties can blackmail/pressurise all companies to succumb to unjustified demands and also conversely, unscrupulous companies can avoid payment/discharge of their liabilities by having their own parties present bogus petitions for winding up. After one is dismissed another could be filed. In this manner the company could avoid discharging its liabilities indefinitely if not permanently. As pointed out the Supreme Court in **Kusum Ingots & Alloys Ltd. v. P.P.S.Ltd, 2000(1)K.L.T. 846(SC)** held that the company and its Directors can be proceeded against for having committed an offence under the Negotiable Instruments Act even after the company has been declared sick under the provisions of the Sick Industrial Companies (Special Provisions) Act, (hereinafter to be referred as SICA). It is pointed out that the SICA does not refer to any criminal proceedings and that it does not create any legal impediment for instituting or proceeding with a criminal case. The section only creates an embargo against disposal of the assets of the company for recovery of its debts. This Court in **Devassy v.**

official Liquidator, 1997(2)K.L.T. 80 held that trial for the offence under Section 138 of the Negotiable Instruments Act cannot be stayed under Section 446 of the Companies Act. It is pointed out that to attract Section 446 of the Companies Act, the proceedings must be in relation to the assets of the company. So far as the offence under Section 138 of the N.I.Act is concerned it can only end in conviction or acquittal of the accused in the case. No recovery of any amount covered by the dishonoured cheque can be made in the criminal case. Counsel has also relied on the decision in **Jaswantrai v. State of Bombay, 1956 S.C.575.** The Supreme Court held therein that there is nothing in Section 179 of the Companies Act, 1913 which can be construed as a restriction of the powers of the court to take cognizance of an offence or the powers of the police to initiate prosecution or even of a private citizen to move the machinery of the criminal courts to bring an offender like the Managing Director of the Company to justice and that for prosecution for breach of trust even by a Director of a company no such condition precedent as contained in the above

provision is required. In **Jose Antony v. Official Liquidator, 200(1)K.L.T.705** it was clarified that proceedings under Section 138 of the N.I. Act are not in respect of the assets of the company and hence Section 446 of the Companies Act has no application and the proceedings cannot be stayed invoking Section 446 of the Companies Act. In **Susgandha Lal** v. **Bobby Varghese, 2000(2)K.L.T.723** this Court explained that the word `procedure' in Section 446(2) can only mean a proceeding similar to a suit and not criminal proceedings. In **M/s.BSI ltd. & Anr. Etc.** v. **Gift Holdings Pvt.Ltd. & Anr.Etc. JT 2000(2) SC 127** the Supreme Court has reiterated that Section 22 of the SICA would not interdict a criminal prosecution as it is not a suit for recovery of money. In **Anil Hada**v. **Indian Acrylic Ltd., AIR 2000 S.C.145** also it was held that the proceedings under Section 138 of the N.I. Act can be pursued against the Directors even if winding up proceedings of the company is pending.

7. State of law as laid down in the cited decisions is that neither the proceedings under the Companies Act nor under the BIFR constitute a bar to initiate criminal proceedings of the

instant nature. Counsel has also relied on the decision of this Court in **Reji Michael** v. **M/s. Vertex Securities Ltd.,1999 (3)I.L.R.504** to assert the fact that a company is a person as defined under Section 11 I.P.C. and is a person within the ambit of I.P.C. It is the contention of the some of the petitioners in the M.C. that the company being an artificial person, offence under Section 409 I.P.C. etc. cannot be sustained. Evidently, the contention in this regard stressed by the petitioners has no merits.

8. In answer to the contentions of the petitioners that the proceedings cannot be sustained as according to them there are no specific allegations against the particular petitioners, counsel for the respondent/ complainant has relied on the decision in **Rajesh Bajaj** v. **State 1999(3)S.C.C.259** wherein the Supreme Court has laid down in no unmistakable terms that if the averments in complaint prima facie make out a case the High Court cannot quash the complaint merely because one or two ingredients of the offence have not been stated in detail. The matter involved in the above cited decision was with respect to

the alleged offences under Sections 420, 417 and 415 I.P.C. The Supreme Court deprecated the attitude of the High Court for having adopted a strictly hyper technical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 I.P.C.

9. Counsel appearing for the petitioners have relied on the following decisions to stress the fact that in the absence of specific averments as to the enticement etc. by the individual Directors and in the absence of prima facie evidence to show that the petitioners were directly involved in the affairs of the company, the proceedings initiated are liable to be quashed : **Ajay Mitra** v. **State of M.P., (2003) 3 S.C.C.11; Hridaya Ranjan Prasad Verma** v. **State of Bihar, (2000)4 S.C.C.168; State of M.P.** v. **Mir Basit Ali Khan, 1971(2)S.C.C.96; U.Dhar** v. **State of Jharkhand, (2003)2 S.C.C.219; Anil Mahajan** v. **Bhor Industries Ltd., (2005) 10 S.C.C.228; Velji Raghavji** v. **State of Maharashtra, AIR 1965 S.C.1433; Supdt. & R.Legal Affairs** v. **Birendra Chandra, AIR 1974 S.C. 290; Radha Ballav** v. **Emporer, A.I.R. 1939**

Calcutta 327; State of Karnataka v. **Pratap Chand (1981) 2 S.C.C.335; Sham Sunder** v. **State of Haryana (1989)4 S.C.C. 630; Katta Sujatha** v. **Fertilizers & Chemicals Travancore Ltd., (2002)7 S.C.C.655; State of Haryana** v. **Brij Lal Mittal, (1998)5 S.C.C.343; MNCPL.Corpn. of Delhi** v. **Ram Kishan Rohtagi, (1983)1 S.C.C.1; Alpic Finance Ltd.** v. **P.Sadasivan (2001)3 S.C.C. 513, Uma Shankar Gopalika** v. **State of Bihar & Another, 2005(10) S.C.C.336.**

10. I find that in **Ajay Mitra's case (op.cit)** wherein the Supreme Court has held that when the complaint or F.I.R. prima facie does not disclose the commission of any cognizable offence against the accused, the same would be liable to be quashed. In the above case the court held that the ingredients of the offence under Section 420 I.P.C. is not made out in the absence of mens rea. The above cited decision was with respect to the offence alleged under Section 420 I.P.C. wherein the first accused had entered into an agreement with the complainant authorising the latter to manufacture and sell certain specified beverages under the trademark owned by the former for 5 years whereafter

either party could terminate the agreement by giving 12 months notice to the other party, but subsequently another company having purchased the trademarks from A-1, the agreement with the complainant was assigned to that company under information to the complainant and the company was also given 12 months notice before the expiry of the period of five years to terminate the agreement. Evidently the above facts would indicate absence of mens rea as well as the ingredients of Section 420 I.P.C. Hence, I find that the above decision has no relevance to the facts of the instant case.

11. In **Hridayaranjan Prasad Verma's case (op.cit)** it was a counter blast complaint filed by respondent No.2 therein against the appellants alleging offence under Sections 418, 420, 423, 504 and 120 I.P.C. Evidently facts therein justified the order under Section 482 Cr.P.C. In **Bir Basit Ali Khan's case (op.cit)** it was in appeal filed by the complainant over the order reversing the order of the Sessions Judge by the High Court and acquitting the accused. The same was with respect to the snow ball schemes which are speculative to the highest degree and

unworkable but it was not dishonest or fraudulent, it was held. As can be found, the above finding was after trial etc. and has no direct relevance to the facts of the instant case. Herein the allegations are that the deposits were canvassed offering high interest rate etc. and did not repay deposits at all and also that the advertisements and representations were made as if to appear that the accused is a subsidiary of a reputed Nationalised Bank. In **U.Dhar v. State of Jharkhand (op.cit)** the issue involved was non-payment of money by a contractor to the sub-contractor after the contractor having received the money from the Government. The court found that Section 403 I.P.C. would not be attracted because the money is not the money or movable property of the complainant. Evidently the facts are entirely different from that of the instant case. In **Anil Mahajan's case(op.cit)** also the facts are entirely different. The court found that there is no allegation in the complaint that the accused made any illegal representation and even according to the complaint the parties entered into memorandum of understanding and the grievance is that the accused failed to

discharge the obligations under the MOU. Hence, it was held that the offence under Sections 415,418 and 420 I.P.C. would not be attracted. The stage of proceedings involved in **Velji Raghavji's case (op.cit)** was appeal before the Supreme Court against the order of the High Court convicting the accused for the offence under Section 409 I.P.C. and the allegation is that the accused who was a partner of the firm failed to account for monies belonging to the firm and that the action amounted to criminal breach of trust. Evidently, the fact situation is entirely different. In **Supdt. & R.Legal Affairs v. Birendra Chandra (op.cit)** the offence involved was under Section 409 I.P.C. and the proceedings was in appeal against the judgment of the High Court acquitting the accused on the ground that the dispute between the parties was essentially of a civil nature. In the above case it was found that there was long and intimate relationship between the accused and the complainant and that there were numerous transactions between them and hence it was difficult to determine the extent to which the complainant was duped or persuaded by mis-representation to part with

rights in certain properties alleged to be the subject matter of breach of trust. Evidently the fact situation has no similarity with the facts in the instant case. In **Radha Ballav's case (op.cit)** also it was in appeal over the decision of the High Court confirming conviction for the offence under Section 420 read with Section 120 B I.P.C. The matter related to a scheme launched by the accused calculated to benefit the policy holders by 12 times the investment. It was also found therein that many of the persons were repaid, but some remained unpaid. Upon a fair reading of prospectus it was held that the same did not contain deceitful representations. Evidently the facts are entirely different from that of the instant case. In **State of Karanataka v. Pratap Chand (op.cit)**, the Supreme Court was dealing with an appeal over the decision of the High Court acquitting the respondents therein for the offence under Section 18-A of the Drugs & Cosmetics Act. That was an appeal by special leave. It was observed that a person "in charge of" and "responsible" to the company for the conduct of the business of the company contemplated in Section 34(1) must be a person in

overall control of the day to day business of the company or firm and that if a partner of a firm is not in such overall control he cannot be liable to be convicted merely because he had the right to participate in the business of the firm under the terms of the partnership deed. Evidently, in the instant case the trial has not commenced and the details are yet to be brought out. In **Sham Sunder's case (op.cit)** it was an appeal by special leave wherein it was held that there can be no vicarious liability for the offence under the Essential Commodities Act. It was held that a person entrusted with business of a firm and responsible for conduct of business alone is liable to be prosecuted and not all partners and that the initial burden lies on prosecution to prove that the accused is responsible for carrying on business and was during relevant time in charge of business. Evidently the above stage is yet to reach in the instant case and the petitioners have also not produced the relevant document explaining their role in the affairs of the company. In **Katta Sujatha's case (op.cit)** it was with respect to the offence under Section 138 of the Negotiable Instruments Act. There was no allegation in the

complaint that the accused was in charge of, and was responsible to the firm for the conduct of the business of the firm. In the instant case there is an allegation indicating that the affairs were carried on under the overall supervision and control of the Board of Directors and the affairs of the company are managed by all the accused and all are directly responsible for the conduct of the business affairs of the company. In **State of Haryana** v. **Brij Lal Mittal (op.cit)** the case was with respect to the offence under the Drugs & Cosmetics Act instituted by the Drugs Inspector wherein the products were allegedly misbranded and adulterated and wherein all the Directors of the manufacturing company were made the accused. It was found in the above case that except a bald statement in the complaint that the respondents were Directors of the manufacturers, there was no other allegations to indicate, even prima facie that they were in charge of the company and also responsible to the company for the conduct of its business. In **MNCPL.Corpn. of Delhi** v. **Ram Kishan Rohtagi (op.cit)** the matter involved was the order for quashing the complaint under

the P.F.A. Act against the Manager and Directors of the manufacturing company. The only allegation was that accused being the Manager and Directors of the company as such were in charge of responsible for the conduct of the business of the company. The Supreme Court upheld the order of the High Court quashing the compliant with respect to the Directors, but sustained the complaint with respect to the Manager. Evidently the allegation in the instant case is not in pari-materia with the allegations in the above case. In **Alpic Finance Ltd. (op.cit)**it was on facts that it was held that the complaint did not disclose elements of deception or fraud etc. The same is the case with respect to the decision in **Uma Sankar Gopalika (op. Cit)** Hence, none of the decisions relied on the counsel for the petitioners are helpful to support the case set up.

12. In the instant case in the complaints filed there are specific allegations that the mobilizing of the affairs at the Kannur branch of the company was under the supervision and control of the Board of Directors, i.e. accused 2 to 10. It is also alleged that the accused represented that the first accused

company is a subsidiary of Vijaya Bank and published many advertisements canvassing deposits and that the accused lured the public to deposit the entire earnings and further the accused secreted or diverted all the amounts by adopting many dubious methods.

13. The contention that the 9th accused, who is a N.R.I., is not involved in the affairs of the company etc. is not supported by any objective evidence, right now. The contention that accused 5 and 6 had resigned on 18-12-1998 from the Directorship is disputed and is a fact yet to be established. It is also to be noted that the allegation is that the accused published misleading advertisements that the company is a subsidiary of Vijaya Bank and that attracted the depositors. The deposits precede the alleged date of retirement. As pointed out by counsel for the respondents the power under Section 482 of the Code of Criminal Procedure is to be exercised sparingly, carefully and with caution and that the "High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete

and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material" (**Ladu Pradhan & Ors. v. State of Orissa, II(1998)CCR 714).** The other contentions that the criminal proceedings are not maintainable on account of the liquidation proceedings or proceedings under BIFR are not tenable for reasons that I have already adverted to above. I find that it will be premature at this stage to quash the proceedings. Hence, the criminal miscellaneous cases are disposed of accordingly without foreclosing the right available to the accused/petitioners to apply for discharge before the court below. If such applications are filed, the court below shall dispose of the same on merits untrammelled by any of the observations contained in this order. The matter will stand posted before the court below on 7-12-2007.

K.R.UDAYABHANU, JUDGE

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K.R.UDAYABHANU, J

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CRL.M.C.NOS. 5404, 5405 OF 2003 &

CRL.M.C.NOS.20, 21, 917, 921 &

2282 OF 2004

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6TH DAY OF NOVEMBER 2007

ORDER

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